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IN THE

Supreme Court of the United States

October Term, 1963.

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD, and FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HARRY J. ALKER, JR., and MAMIE DU BAN, Individually and as EXECUTRIX OF THE ESTATE OF ALFRED A. DU BAN, DECEASED,

Petitioner.

PETITION FOR RE-HEARING OF PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioner.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Harry J. Alker, Jr., respectfully represents that:

1. On August 6, 1963, he filed in this Honorable Court a petition for allowance of Writ of Certiorari to the United States Court of Appeals for the Third Circuit, seeking review of the Appellate Court's interpretation of Rule

60(b) of the Federal Rules of Civil Procedure; of this Court's opinion in the case of *Federal Deposit Insurance Corporation v. D'Oench, Duhme Co.*, 315 U. S. 447; and several other important findings of that Court.

2. Thereafter, a Brief for Respondents in opposition to Petition for Certiorari was duly filed herein by said respondents, Butcher & Sherrerd and Fidelity-Philadelphia Trust Company, Trustee. Although served by petitioner with copies of his Petition for Allowance of Writ of Certiorari, the Federal Deposit Insurance Corporation did not appear or file a Brief herein.

3. On October 21, 1963, this Honorable Supreme Court denied the petition for Writ of Certiorari.

4. Petitioner believes and therefore avers that, because of the welter of controversies ensuing from the accumulation of an enormously large number of cases filed with this Honorable Court during the 1963 Summer recess, your Court may have inadvertently overlooked the nation-wide importance of the questions of Federal law presented by petitioner's original application for Certiorari herein.

(a) These questions of national importance have always been, and still are, cited in the Rules of this Honorable Supreme Court, and doubtless the most cogent motivation, for the granting of a review by Certiorari from this Court, viz:

Whether or not a Court of Appeals has misinterpreted a Federal statute or Rule of Civil Procedure, whether or not a Court of Appeals has misinterpreted a decision and opinion of this Honorable Court; and whether or not two or more Courts of Appeal have decided a question of law differently.

(b) All such premises suggested by this Court's own rules are present in this case.

5. Hence petitioner respectfully suggests that it is well-nigh imperative that all United States Judges, the many hundreds of thousands of bank depositors and borrowers, who might otherwise be victimized by the utter lack of such a beacon, are entitled to ultimate guidance inevitably ensuing from a definitive, reasoned opinion of this Honorable Court to be reported on these grave Federal questions, properly raised, but improperly decided in the Court below.

6. The instant matter is of great importance, because, today, every one seems to be borrowing from banks, agreements are made, and where an honest agreement is made, both sides should be compelled to live up to such agreement. It is more important because the Appellate Court in this case relies on the *D'Oench, Duhme Co.* case (315 U. S. 447), which was a fraud case, whereas herein there was no fraud, and the *D'Oench, Duhme* case should not apply.

That the general public and banking institutions are greatly interested in this matter is indicated by an article that appeared in "The Pennsylvania Banker" (dated September 2, 1950), "meanwhile, it was learned that the Kansas Supreme Court takes the opposite viewpoint from that rendered by the Third Circuit in the case of *F. D. I. C. v. DuBan.* In the latter decision, it was held substantially that F. D. I. C. is not bound by any contract whether fraudulent or not, made by an insured bank as to an asset acquired by F. D. I. C. However, the Kansas Supreme Court, in *F. D. I. C. v. Cloonan*, 165 Kans. 68; 193 Pacific Rep. 2d ser. 656, held that the only parties to contract by F. D. I. C. with an insured bank under which banks assume insured deposit liabilities of a failed bank, are the corporation and the bank, and a creditor or debtor of failed bank is not a party, and his rights and liabilities are not affected by terms of contract.

The decision also holds that where F. D. I. C. contracted with state banks to assume deposit liabilities of

failed banks, and corporation took over assets of failed bank which were not acceptable to state bank, F. D. I. C. became a holder of such assets with same rights as failed bank would have had, but was not a holder in due course of notes comprising a portion of assets. . . . ."

Proof has never been produced that the Alker agreement with Integrity was a secret agreement.

It should be noted that the F. D. I. C., in the instant case, never pleaded a secret agreement, and therefore should not now be permitted to use it as a defense.

Mr. Matsinger, the Pennsylvania State Bank Examiner, testified in a deposition taken in the office of petitioner's counsel, Honorable Owen J. Roberts and McCracken, in Philadelphia, and who was also cross-examined by F. D. I. C.'s counsel, that the Federal Reserve and State bank examiners worked together on the examinations of the Integrity Trust Company; that the officers of the Integrity disclosed to the examiners the nature of the Alker agreement, and they all thought it was a good thing for the bank.

A question arose during the original trial of this matter as to whether or not the Alker agreement appeared in the Minutes of the Bank's executive committee. It was brought out that the pages thereof were taken apart by other persons searching said records for different matters in which they were interested and some of the pages were not returned, lost, mislaid or destroyed. However, evidence was produced that Mr. William P. Gest, President of the Fidelity-Philadelphia Trust Company, who knew Mr. Alker, was also chairman of the Executive Committee of the Integrity Trust Company, and that he regularly asked, when Mr. Alker's loan came before the executive committee, whether Alker was living up to his agreement, and when advised by the officers that he was, he stated that if Alker lived up to it, the bank must.

7. Here, in the instant case, the petitioner, Alker, was indebted to the Integrity Trust Company, a Pennsylvania State institution whose deposits were insured by the Federal Deposit Insurance Corporation.

The Integrity Trust Company made a loan in 1929 to Harry J. Alker, Jr., on certain collateral. The collateral depreciated and the Trust Company in 1931 requested additional collateral. Alker was not in shape to advance this, and DuBan, a friend, offered to deposit 1,000 shares of the common stock of the National Dairy Products Corporation provided Alker deposited and maintained a large life insurance policy in favor of the trust company, assigned certain fees and maintained the interest and so long as he did so the trust company would not liquidate the loan or force the situation. The trust company then felt it would take five years within which to work the situation out and fixed the time limit for forbearance at five years and placed a term insurance policy for that time. This was satisfactory to Alker and DuBan and the stock was deposited by DuBan. The fees were assigned by Alker and the insurance was placed by the trust company at Alker's expense. The depression still existed in 1936 when the first insurance policy expired and it was agreed therefore that the time must be extended; the trust company determined it would take ten years more to work the situation out; the time for forbearance was extended for ten years and a new term policy for that period placed. The trust company arranged this insurance through a Mr. Santamarie, an insurance expert, stating to him that the loan was being extended for ten years. The original agreement and extension were oral and were approved by the executive committee of the trust company of which Mr. William P. Gest was a member. Alker carried out his part of the agreement and so did DuBan. The trust company of course reserved the right without restriction in the event of default to call the loan and convert the collateral. During all these years, Alker maintained the insurance, paid the interest, turned over the

assigned fees as received, and made certain reductions on the principal. In 1940, while this arrangement was in effect, the Integrity Trust Company was about to fail. The Federal Deposit Insurance Company a day or so before the actual closing advanced certain moneys to the Integrity, taking the assets of the corporation as collateral for itself and twelve state institutions who also had advanced cash to the Integrity. *Under the terms of its agreement with the state institutions the Federal Deposit Insurance Corporation acted as "liquidating agent" for the group.* It interviewed Alker and others conversant with the Alker loan and agreement, and after such interviews and with knowledge of said agreement, relating to said loan continued to accept Alker's interest, certain of the fees, and the benefit of the insurance for over two years, never during that time either questioning or intimating an intention of repudiating the agreement. In 1943, the Federal Deposit Insurance Corporation, while still acting as liquidating agent, suddenly arbitrarily repudiated the agreement, and sold to itself all the collateral with the loan, except one large assigned fee. Since the sale the securities have appreciated tremendously, and, had the securities been held as collateral in accordance with the agreement, the loan would have been paid in full and the excess collateral restored to the respective parties.

An *equity* proceeding was instituted in the District Court by the F. D. I. C. after the sale to establish a deficiency against Alker, and to compel the National Dairy Products Corporation to transfer the DuBan stock standing in DuBan's name to the Federal Deposit Insurance Corporation. At the trial, the Federal Deposit Insurance Corporation took the position it was not bound by the agreement with the trust company on the theory it was an alleged lender without notice; this in spite of the fact that it had accepted the interest and checked the insurance status regularly since 1940, after knowledge of the alleged agreement. Had Alker died during this period it would

have received $125,000 under the insurance policies. The Federal Deposit Insurance Corporation admitted at the trial there had been no default in the payment of interest or the maintenance of the insurance or the payment of the assigned fees as received.

At no time during the trial did the Federal Deposit Insurance Corporation reveal to the chancellor the fact that it was acting as liquidating agent for itself and the twelve state institutions. This fact was not known to your petitioners until years afterward when a public announcement was made in the newspapers by the Federal Deposit Insurance Corporation that the state institutions had been paid back by the Federal Deposit Insurance Corporation as liquidating agent all the money that was due them by the Integrity Trust Company. At the trial the Court refused to hear the testimony of the insurance agent who arranged the insurance for the Integrity and who discussed the matter with the trust company's executive officer, which said insurance agent was prepared to testify that in 1936 the said executive officer advised him the trust company was making a ten-year loan and must have insurance protection to cover that period. The District Court, without this testimony (which would have clarified the situation), decided the agreement was too indefinite as to time of performance. The Chancellor, however, found as a fact there was no fraud.

When the matter was appealed to your Honorable Court, this question was not passed on, but the Court, simply assuming that there was a valid contract, decided that the case was controlled by the *D'Oench, Duhme* case, 315 U. S. 447; and that as a matter of law, the agreement was a "secret agreement" and contrary to the policy to protect the Federal Deposit Insurance Corporation as established by that case.

That in the trial of the said case, a representative of the plaintiff testified that the Federal Deposit Insurance

Corporation had made an advance to the trust company immediately before it closed, taking as collateral the assets of the bank including the said note and collateral and in so doing it had relied entirely upon the bank examiners for its information as to the collateral and any agreements relating thereto.

8. At the trial, the Federal Deposit Insurance Corporation produced two examiners, who testified that they *found among the records no evidence of any agreement* relating to the alleged note of Alker, one of the petitioners. They do not say they were not informed there was an agreement.

9. That *at the trial of the case* the defendant offered to prove by L. J. Santamarie, an insurance expert, that the executive officer of the trust company had advised him in discussing the insurance, which it was arranging through him, that the loan had been extended for ten years from 1936 and that the insurance company must have an insurance policy on Alker's life for $100,000, to cover a ten-year period, and had him place such a policy. That the offer of this evidence was refused by the trial court. His deposition was subsequently taken and filed in Court.

That one of the objections the Trial Court made to the agreement, which it admitted had been made, was lack of certainty as to time of performance. Mr. Santamarie's testimony would have answered this objection, and subsequently did, as it definitely fixed the period for forbearance.

He was corroborated in this by the testimony of John Pellini who also testified as to the execution of the new Alker note and the inscription put on his old notes by the bank officials. Pellini also testified as to his incorrect filing of the mislaid returned note which kept it from being produced at the trial.

The interest of the general public as well as lawyers and law journals, nation-wide, in the final decision of the questions involved in this case as to Rule 60(b) is amply

indicated by the excerpts from the various law School Law Journals and Barrons and Holtzhoffer's treatise, all of whom had articles on the subject and copies of which are in the record.

The trial judge in this instant case was the Honorable George Welsh, a judge and chancellor of great judicial experience and who heard the case from beginning to end and who twice found, under Rule 60(b) that petitioner was entitled to a new trial. It is contended that he should have been permitted to hear argument on the last motion for a new trial instead of being directed not to hear any more contested motions and arguments, shortly before this case came up for hearing. He was the sole one to find whether or not fraud and misrepresentation had been practiced upon his Court by the plaintiff.

There are many reasons for the allowance of a new trial such as the following:

It is believed the lower Court Judge misconstrued the Court of Appeals' order and restricted the petitioner to new witnesses and would not permit a witness, who had already appeared, to give testimony as to matters he had not been asked about before.

It was vital that such testimony should be taken.

The necessity for this proves that justice requires a new trial should be granted at which all the witnesses would appear and testify at the same hearing. To fail to grant the same constitutes a denial of his rights and prevents equity and justice being done.

Respondents refer to the fact that whoever examined the Minutes of the executive committee failed to find an approval for it of the agreement between Alker and the Trust Company.

One of the employees of the company testified that various people had come to the Trust Company about matters before the Executive Committee, and pulled the same apart, with the result that many parts were missing and

out of place, and one could not tell whether the Committee records had shown approval of the loan from time to time or action thereon.

John Pellini testified when the last extension was made the old notes were returned some time later, and that they bore endorsements, that he filed them away, and then for a long time could not find them. Long after, in doing some filing in old flaps, he discovered them in a flap marked "Adoptions", which was next to an "Alker" flap, which "adoption" flap had not been used for a long time.

The same bore endorsements:

"for addtl. collateral and agreement with Mr. Alker and A. A. DuBan
see W. K. H."

"For addtl. collateral and agreement with Alker and A. A. DuBan
see other note and W. K. H."

[The initials "W. K. H." in both endorsements refer to Walter K. Hardt who had been President of the Integrity Trust Company.]

Testimony was given by the use plaintiff that no such endorsement appeared on the photographic copy of the note in the possession of the bank.

An employee of the Trust Company testified this could well have happened, as the duplicating machine was new, and not working properly a large part of the time, and the employes of the Trust Company had not yet become very proficient in operating same and, if note was not put in right, endorsement would not appear.

When Judge Welsh was all set to hear argument of the motion for new trial the last time, and counsel were present, one of counsel for the use plaintiff appeared and stated to the Court that, in the matter, Attorney Almsted had always appeared for the F. D. I. C.; and asked the

Court to continue the argument to permit the F. D. I. C. to arrange for Mr. Olmsted to appear for it. Had it not been for that, the motion for new trial would have been argued then and there, and the matter in due course disposed of by Judge Welsh.

Although notice was always given to the representative of the Federal Deposit Insurance Company, the representative of the Federal Deposit Insurance Company has *not* appeared.

As in the event Alker is successful and the sale of the securities is set aside, it will be an important matter for the Federal Deposit Insurance Company, and it is important that a new trial be granted at which *all* the evidence may be presented at one hearing and the Federal Deposit Insurance Corporation participate.

Long ago the F. D. I. C. tried to substitute the Secretary of Banking, Receiver, for itself. The Court refused to let them do so and thus avoid their responsibility. They were only allowed to mark the matter to the use of, thus being retained in the picture.

The Federal Deposit Insurance Corporation *originally* claimed it was the owner of the notes and instituted this equity proceeding as such. It was not *for a long, long time* that it announced it was acting as the agent for a number of state banks.

As this changed the situation completely, it constituted misrepresentations and the Federal Insurance Corporation could not take any advantage of *time*. In *Publicker v. Shallcross, et al.*, 106 Fed. 2d 949, the Court of Appeals for the Third Circuit held, where there has been misrepresentation in a matter, the party guilty of the misrepresentation can not raise any question as to time and delay. This answers the contentions of the F. D. I. C. and the use plaintiff. The matter has run over a long period of time. However, all the evidence was not available, witnesses had to be located, Alker was ill for a considerable time. Because of

all this it has taken a long time, but the F. D. I. C. and the use plaintiff cannot complain.

An effort was made to have the law as to the rights of the F. D. I. C. in connection with contracts between banks insured by it and customers clarified. The Act was amended but not made retroactive. As the agreement here involved was prior to the date of the Act, it does not apply here—as set forth in the Congressional record for July 20, 1950, page 10886.

After the F. D. I. C. alleged it had terminated the agreement, it accepted interest on the indebtedness from Alker for two months. Then, later on, discovering it had so acted, it attempted to apply the payments to principal even though Alker refused to agree thereto, claiming there had been no default, the loan had several years to run, and the alleged termination and sale of assets were illegal. For years afterwards he tendered interest regularly and maintained the insurance.

After the alleged termination of the loan and alleged sale of the securities, Alker saw Leo Crowley, the head of the F. D. I. C. in Washington, in reference to the matter. Mr. Crowley called Chicago and talked, and then advised Alker his collateral was intact, advised Alker if Alker would raise $50,000 cash and get a fee of $50,000 due him and apply them on account, he would reopen the matter and extend the same for a number of years at 3%. Alker raised the $50,000 cash, but the attorney here for F. D. I. C. interfered with the fee referred to, and Alker was unable to get it released right away. A long time afterwards in the course of the litigation, an effort was made to reopen the matter, and one of Alker's clients deposited with the District Court $50,000 in securities as an evidence of good faith. The attorney for the F. D. I. C. spoiled this.

The above proves the honesty of Alker and his desire to secure justice and equity.

Heretofore the F. D. I. C. and the use plaintiff raised the question as to definiteness of time.

The evidence clearly showed there was a definite time —first five years and then ten years.

John Pellini and Mr. Santamarie, both testified they were so advised by the bank officials. This evidence is neither impeached nor controverted by the plaintiff; hence it is conclusive in favor of your petitioner.

Judge Welsh was in the case from the beginning. During one of the hearings he said he would not finally decide the case until he had all the evidence. He was available for the final proceedings and should at least have sat in on it in order that justice might be done. By failing to have him sit in on the matter and give the benefit of his experience in it the petitioner Alker was deprived of his legal rights and the matter should be sent back for retrial with him at least sitting with one of the Judges. He is and was always available.

Wherefore, the petitioner, reiterating that he has fully complied with the extension agreements, cogently proved as shown by the record, which were thereafter confirmed, and then wantonly disregarded and violated by this Federal corporation, the F. D. I. C., earnestly and respectfully insists that, not only do equity and justice but also the record facts and the nationally important law applicable thereto inevitably show that the new trial granted in this case by the learned hearing jurist, Judge Welsh, conformably to Rule 60(b), ought most certainly be confirmed. And this very proper disposition of the case may now be achieved only by the swift and certain issuance of this Honorable Supreme Court's writ of certiorari for which your petitioner herein courteously prays.

Respectfully submitted,

JAMES J. REGAN, JR.,
ROBERT M. TAYLOR,
Attorneys for Petitioner.

HARRY J. ALKER, JR.,
Petitioner.

Petitioner certifies that the preceding Petition for Re-hearing is presented in good faith and not for delay, and is restricted to the grounds above specified.

JAMES J. REGAN, JR.,
ROBERT M. TAYLOR,
Attorneys for Petitioner.